80-1169

No.

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

FAULKNER RADIO, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

The decision of the Federal Communications Commission, affirmed by the court of appeals, presented the following questions:

(1) Whether the Federal Communications Commission can deny an application for renewal of a broadcast station license because the licensee, in accordance with the provisions of Section 309(d) of the Communications Act, filed a petition to deny the application for a new broadcast station, which would be a competitor, on the ground the petition was filed primarily for the purpose of delay.

(2) Whether the Federal Communications Commission, in a license renewal proceeding, may find an applicant has been guilty of misrepresentation or other conduct on less than "clear and convincing" evidence* when such a finding will permanently disqualify it from being a broadcast licensee.

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*One aspect of the issue of whether an administrative agency's findings must be supported by clear and convincing evidence, rather than by a mere preponderance of the evidence, when the agency makes a determination which has the effect of permanently excluding an individual or corporation from the business regulated by that agency is currently before this court in *Steadman v. Securities and Exchange Commission*, No. 79-1266.

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No.

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FEDERAL COMMUNICATIONS COMMISSION,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Faulkner Radio, Inc., petitions that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

PARTIES TO PROCEEDING

In addition to Faulkner Radio, Inc.[1] and the Federal Communications Commission, William P. Johnson and

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[1] In accordance with Rule 28.1 of the Rules of the Supreme Court of the United States, it is noted that Faulkner Radio, Inc. is a closely held corporation with no subsidiaries or affiliates.

Hollis B. Johnson, d/b/a Radio Carrollton, were parties to the proceedings before the Federal Communications Commission.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit for which petitioner seeks review is *Faulkner Radio, Inc. v. Federal Communications Commission*, No. 79-1749 (October 15, 1980). That decision is not reported, but it is reproduced at pages 1a-2a of the Appendix.[2] The decision of the lower court affirmed decisions of the Federal Communications Commission, reported as *Radio Carrollton*, 72 F.C.C.2d 264 (1979), App. 3a; *Radio Carrollton*, 69 F.C.C.2d 424 (1978), App. 15a; and *Radio Carrollton*, 69 F.C.C.2d 1139 (1978), App. 17a.

Those decisions were reached after remand by the lower court in *Faulkner Radio, Inc. v. Federal Communications Commission*, 557 F.2d 866 (D.C. Cir. 1977), App. 36a, of the decision of the Federal Communications Commission in *Radio Carrollton*, 52 F.C.C.2d 1173 (1975), App. 59a, affirming the initial decision reported at 52 F.C.C.2d 1187 (I.D. 1974), App. 73a.

JURISDICTION

The judgment of the court of appeals was entered on October 15, 1980. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1) (1976).

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[2] The appendix (App.) to this petition is set forth under separate cover.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This case involves the First Amendment to the Constitution of the United States; Sections 309(d)-(e) of the Communications Act of 1934, as amended, 47 U.S.C. §§309(d)-(e) (1976); and Section 73.3584 of the Rules and Regulations of the Federal Communications Commission, 47 C.F.R. §73.3584 (1979). These provisions are reproduced in the Appendix at 127a-133a.

STATEMENT OF THE CASE

Petitioner Faulkner Radio, Inc. ("Faulkner") is the licensee of standard (AM) Broadcast Station WLBB, Carrollton, Georgia. Petitioner is also the licensee of six other radio stations in Georgia and Alabama. On November 29, 1967, William P. Johnson and Hollis B. Johnson, doing business as Radio Carrollton ("RC"), filed an application with the Federal Communications Commission for authority to construct and operate a new standard broadcast station at Carrollton, Georgia. On June 18, 1968, Faulkner filed a Petition to Deny the RC application. Section 309(d)(1) of the Communications Act of 1934, as amended, 47 U.S.C. §309(d)(1), provides that any party in interest may file with the Commission a petition to deny any application. Faulkner, licensee of a station with which the proposed RC station would be in direct competition for advertising revenues and listening audience, was clearly a "party in interest."

On November 15, 1972, the Commission designated for hearing the RC application for a construction permit and the Faulkner application for renewal of WLBB's license. Although the two applications were not mutually exclusive, the Commission determined that the factual disputes involved "inextricably connect[ed]" the applica-

tions and consolidated them for one hearing. *Radio Carrollton*, 38 F.C.C.2d 68, 69 (1972), App. 119a, 120a.

The Commission initially specified seven issues in the proceeding. Two of the issues specified against RC were raised by Faulkner in its original Petition to Deny. The only two issues specified against Faulkner were: 1) Whether Faulkner had filed its Petition to Deny for the purpose of delaying the processing of the RC application, and, if so, what effect that conduct had on the basic qualification of Faulkner to be a Commission licensee; and 2) Whether Faulkner or RC had misrepresented itself to the Commission in its affidavit recounting the details of the telephone conversation on June 20, 1968, between Thorburn, a Faulkner principal, and Johnson. *Id.* at 75, App. 126a. On October 18, 1973, the Review Board added an issue against RC to determine whether another party had a secret one-third ownership interest in RC and whether RC had been lacking in candor with the Commission concerning this interest. *Radio Carrollton*, 43 F.C.C.2d 472 (Rev. Bd. 1973), App. 115a.

The Administrative Law Judge's Initial Decision granted the RC application for a construction permit and denied Faulkner's application for renewal of Station WLBB. *Radio Carrollton*, 52 F.C.C.2d 1187 (I.D. 1974), App. 73a. This Decision was affirmed by the Commission on April 30, 1975. *Radio Carrollton*, 52 F.C.C.2d 1173 (1975), App. 59a.

Both the ALJ and the Commission found that Faulkner's principal, Thorburn, had made misrepresentations to the Commission in affidavits filed with the Faulkner Petition and supplements as well as in his testimony. Both also concluded that at least one of Faulkner's purposes in filing its Petition to Deny was to delay the RC application. The ALJ compared the filing of a

petition to deny for purposes of delay to the Commission's strike application policy. *Radio Carrollton*, 52 F.C.C.2d at 1227 & n. 37, App. 113a. In affirming the ALJ's Decision, the Commission stated that the ALJ's comparison of a strike application to a petition to deny filed for delay was "apt." *Radio Carrollton*, 52 F.C.C.2d at 1178, App. 64a. The Commission then applied the "guidelines" of its strike application policy to the Petition to Deny filed several years earlier by Faulkner and determined that Faulkner had filed a "strike" petition to deny, thus placing its own license in jeopardy.[3] *Id.* at 1178-80, App. 64a-66a.

In a collateral proceeding, the Commission has withheld action on the renewal applications of Faulkner's other six radio stations. In *Faulkner Radio, Inc.*, 61 F.C.C.2d 23, 25 (1976), App. 55a-57a, the Commission held that, in lieu of a hearing on those applications, its decision in *Radio Carrollton* with respect to WLBB would be "*res judicata*;" and it would afford Faulkner only an oral argument to determine whether the other six license renewals should be granted.

The decision in *Radio Carrollton* was appealed by Faulkner and was vacated and remanded by the United

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[3] The Administrative Law Judge's and the Commission's use of the analogy of "strike applications" as a basis for holding that a petition to deny becomes a strike petition when filed for delay purposes was completely without foundation. There is no constitutional right to influence another person to file an application, nor has it been decided that there is a constitutional right to file an application. *Whether or not the Commission's prior rulings on strike applications are valid, it is clear that the rights of Faulkner are completely different.* It is significant, however, that the Commission could find no other authority to support its action in this proceeding.

States Court of Appeals for the District of Columbia Circuit because of the conduct of the ALJ. The Court also expressed concern that the Commission's strike petition policy would have a "chilling effect" on other licensees desiring to file petitions to deny and stated that on remand the Commission would be "well advised to clarify its policy on strike petitions." *Faulkner Radio, Inc. v. FCC*, 557 F.2d 866, 873-76 (D.C. Cir. 1977), App. 36a, 48a-54a. However, no reference was made to petitioner's arguments concerning the constitutionality of the Commission's findings on delay.

In its decision on remand the Commission affirmed its earlier finding that Faulkner was unqualified to remain a Commission licensee. *Radio Carrollton*, 69 F.C.C.2d 1139 (1978), App. 17a. It also formulated new standards for its strike petition policy, applied the new standards to Faulkner's petition filed ten years before, and concluded that Faulkner had filed its petition for the "primary and substantial" purpose of delaying the RC application. *Id.* at 1151-55, App. 29a-33a. Although the Commission acknowledged that two of the three issues in the original Petition to Deny and seven of the eight supplements thereto were *bona fide*, the Commission nevertheless concluded that Faulkner's Petition to Deny and the June 1970 Supplement thereto were filed to delay the grant of the RC application. *Id.* at 1154-55 & n. 30, App. 32a-33a. This, said the Commission, constituted a separate and distinct ground for denying the Faulkner renewal application. *Id.* at 1155, App. 33a.

In evaluating the evidence on remand, the Commission repeatedly and consistently approached its evaluation as an appellate court would, reviewing its earlier decision and affirming it because it was supported by "substantial evidence." *See Id.* at 1143-48 & n. 23, App. 21a-26a.

However, on June 28, 1978, after the oral argument in *Sea Island Broadcasting Corp. of S.C. v. FCC,*[4] in which the Commission's use of the term "substantial evidence" in the decision on remand in *Radio Carrollton* was criticized, the Commission issued a "*sua sponte* reconsideration" of its May 18 *Order*, stating that "in using the inclusive term 'substantial' we meant there was reliable and probative evidence in the record which clearly satisfied the customary preponderance of the evidence standard. . . ." *Radio Carrollton*, 69 F.C.C.2d 424, 425 (1978), App. 15a, 16a.

The Commission again considered the WLBB renewal on petitions for reconsideration filed by Faulkner. *See Radio Carrollton*, 72 F.C.C.2d 264 (1979), App. 3a. In its decision on reconsideration, the Commission reaffirmed its decision on remand and further clarified its strike petition policy, defining a strike petition to deny as one filed with the primary purpose to delay. *Id.* at 271 & n. 10, App. 10a.

The decisions were appealed by Faulkner and affirmed by the United States of Appeals for the District of Columbia Circuit without opinion. App. 1a.

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[4]The oral argument in *Sea Island Broadcasting Corp. of S.C. v. FCC*, No. 76-1735, was held on June 2, 1978, two days after the Commission's decision on remand was released. The Court of Appeals' decision in *Sea Island* was released on January 14, 1980, and is reported at 627 F.2d 240 (D.C. Cir. 1980). Certiorari in the *Sea Island* case was denied on October 6, 1980. 49 U.S.L.W. 3246 (1980).

REASONS FOR GRANTING THE WRIT

I.

THE FEDERAL COMMUNICATIONS COMMISSION'S CONCLUSION DISQUALIFYING A LICENSEE FOR FILING A "STRIKE" PETITION IS CONTRARY TO THE INTENT OF CONGRESS AND THE RULINGS OF THIS COURT AND VIOLATES PETITIONERS' RIGHT TO PETITION PROTECTED BY THE BILL OF RIGHTS

This is a case of first impression which imposes severe restrictions upon the rights of licensees of broadcast stations, resulting in serious adverse consequence to the public. The Federal Communications Commission has held that Faulkner must forfeit its license (of Standard Broadcast Station WLBB, Carrollton, Georgia) because it purportedly filed a "strike" petition to deny the application of a potential competitor. In reaching this conclusion, the Commission stated:

> "the evidence clearly demonstrates Faulkner did file a strike petition. Plainly, one of Faulkner's purposes was to obstruct, impede and delay the grant of RC's application. It is unnecessary to find this was Faulkner's sole—or even primary—purpose in order . . . to put its license in jeopardy. Hence, we find Faulkner's arguments unpersuasive and we conclude its petition was not filed for legitimate public interest purposes." *Radio Carrollton*, 52 F.C.C.2d at 1180, App. 66a.

The significance attached to the alleged intent of Faulkner in filing its petition to deny is further demonstrated by the Commission's conclusion that the petition and a supplement thereto "were not filed on the basis of public interest motives, even assuming *arguendo* they had a reasonable basis in fact." *Id.* at 1179, App. 65a.

In its decisions issued subsequent to the remand, the Commission reaffirmed its early statements on delay and again stressed the increased burden it places upon licensees when filing a petition to deny, stating: "[t]he 'strike' petition policy involves a situation where a party abuses our processes by claiming to act in furtherance of general public interests when, in fact, his primary purpose is to advance anticompetitive interests that have no place in our regulatory scheme." *Radio Carrollton*, 72 F.C.C.2d at 271, App. 10a.

Faulkner submits that decisions of this Court clearly hold that, so long as a party in interest complies with constitutional, statutory and regulatory prescriptions, the filing of a petition to deny is manifestly a protected constitutional right; and the filing may not be found to be illegal or improper, assuming that the petition is not a "sham pleading," even if the primary purpose in filing is to obstruct, impede or delay the grant of an application.[5] Faulkner, as the record amply demonstrates, complied with all of the prescribed statutory and regulatory procedures.[6] The Commission made no findings to the contrary, being primarily concerned with the "delay" of the proceeding resulting from the pleadings.

Faulkner's standing as a party in interest was predicated on an allegation of economic injury as defined in *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940), rather than as a representative of the public interest as defined in *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir.

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[5] See footnote 8, *infra.*

[6] *See* Section 309(d)(1) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(d)(1) and Section 73.3584(a) of the Commission Rules and Regulations, 47 C.F.R. § 73.3584.

1966).[7] The distinction was of apparent significance to the Commission which affirmed the ALJ's conclusion that "a 'private attorney general' who is also a potential business competitor assumes a particularly difficult burden respecting truthfulness and accuracy in bringing charges against his potential adversary." *Radio Carrollton*, 52 F.C.C.2d at 1181, App. 67a. No legislative or judicial support has been cited for that conclusion. *To the contrary, Congress and the courts have concluded that only an unrestrained competitor is likely to bring to the Commission's attention allegations which the Commission has the duty to investigate.*

This Court has specifically addressed the question of a citizen's right to petition the government in decisions relating to antitrust. *E.g., California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961). It is submitted that these decisions are controlling in this case.

In *Noerr*, this Court held that no cause of action was alleged insofar as it was predicated merely upon attempts to influence the legislative branch for the passage of laws or the executive branch for their enforcement. The Court stated that:

> "The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of

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[7] Representatives of the public interest are encouraged to bring to the attention of the Commission pertinent facts concerning present and prospective licensees. Indeed, the Commission issued a revised News Release (No. 54751, September 5, 1975) indicating that specific mailings were to be made *by the Commission* to certain "public interest" groups "to ensure that they are informed of Commission proceedings in which they may wish to participate."

> course, lightly impute to Congress an intent to invade these freedoms." 365 U.S. at 138.

The Court also stated that "insofar as the railroads' campaign was directed toward obtaining governmental action, its legality was not at all affected by any anti-competitive purpose it may have had." *Id.* at 140.

In *Pennington, supra,* this Court held that the lower court had failed to take proper account of its holding in *Noerr* "that anticompetitive purpose did not illegalize the conduct there involved." 381 U.S. at 669. The Court went on to state:

> "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose. . . . Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act." 381 U.S. at 670.

Subsequently, it was held in *California Motor* that "[t]he same philosophy governs the approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and arms of the executive) and to courts, the third branch of Government." 404 U.S. at 510.

It is clear from these cases that neither the intent nor a financial or competitive interest in the outcome of the legal actions of those who are asserting their right to petition jeopardizes that right.[8] As this Court has declared:

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[8] In the *Noerr–California Motor* cases, the Supreme Court also discussed conduct which would be a sham, conduct which was completely different from Faulkner's use of its statutory and

[footnote continued]

> "Indeed, it is quite probably people with just such a hope of personal advantage who provide much of the information upon which governments must act. A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them." *Noerr, supra* at 139.

The decision of the Commission has illegally modified this Court's ruling in *Sanders*, is contrary to the intent of Congress, and has violated the protection guaranteed to licensees by the Bill of Rights. Moreover, the Commission has sacrificed the rights of the public simply to reduce its administrative backlog and lighten its work schedule. The Commission's decision has had the effect of virtually eliminating the filing of petitions to deny by licensees against pending applications.[9]

In *Sanders, supra,* this Court held that a person who suffered economic injury might be the only one with sufficient interest to bring errors of law to the attention of the appellate court. It specifically held that Congress had intended to confer standing to such a person to proceed under the provisions of Section 402(b).[10] 309

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constitutional rights. The Commission made no finding that the petition to deny and the June 1970 Supplement were "sham pleadings." Indeed, it concluded that only one issue out of several in the petition and only one of the eight supplements were included for purposes of delay. *Radio Carrollton*, 69 F.C.C.2d at 1155 & n.30, App. 33a.

[9] The Commission's records do not reveal how many, if any, petitions to deny have been filed by licensees against applications for new stations since the date of the original decision on this case.

[10] *See* Section 402(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 402(b) (1976).

U.S. at 477. This Court clearly contemplated that such a party could or would be motivated by an intent to delay.

Eleven years later, Congress enacted Section 309(c),[11] the so-called protest procedure, wherein it incorporated this Court's definition of a party in interest and gave existing licensees the right to delay the effectiveness of a grant of an application by requiring the Commission to set such grants aside. *See* S. Rep. No. 44, 82d Cong., 1st Sess. 8 (1951).

In 1960, Congress amended the Communications Act to eliminate the protest procedure and substituted the present provisions of Section 309(d).[12] In earlier hearings on Section 309(c) the Commission, members of the Bar, and representatives of the public testified before committees of Congress that the protest procedure had allowed existing licensees to file protests simply for the purpose of delay. The Senate report found that " 'part[ies] in interest' . . . have the power to force the holding of full evidentiary hearings and to delay the institution of new radio and television service." S. Rep. No. 1231, 84th Cong., 1st Sess. 2 (1955). There was no contention by those testifying that such a purpose was illegal or improper, but only that that statute should be changed to give the Commission a method to reduce the delay caused by such protests. In fact, the Report states that H.R. 5614 does not attempt to limit those who have standing as a "party in interest" to file protests. *Id.* at 3.

Thus Congress, as has this Court, has specifically recognized the need to allow parties with an economic

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[11]Section 309(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(c), Pub.L.No. 554, 66 Stat. 715 § 7 (1952) (amended 1960).

[12]Communications Act Amendments, 1960, Pub.L. 86-752, 74 Stat. 889 § 4(a) (1960).

interest to file pleadings with the Commission, since they often were the only ones to have sufficient interest to investigate, determine the facts and assume the expense of bringing these charges to the attention of the Commission and then appearing at a hearing if one were ordered. Therefore, it is clear that 309(d) was enacted to give the Commission the authority to dismiss charges that had no merit without a hearing in order to eliminate this delay. No question was raised by Congress about the right of such parties to file petitions even if they had an intent to delay. *See* H.R. Rep. No. 1800, 86th Cong., 2d Sess. 9-14 (1960).

The Commission has now added a new provision to Section 309(d) by providing that an existing licensee cannot utilize the rights conferred upon it by Congress if its primary purpose is to delay an application. To this end, the new strike petition policy contains five criteria, all designed to determine one purpose alone—whether the petitioner's primary purpose was to delay.[13]

The lower court expressed concern that the new policy could have a chilling effect by preventing the flow of vital information to the Commission and stated that such a result would be inconsistent with the Congressional intent and injurious to the public interest. *Faulkner*, 557 F.2d at 875, App. 52a-53a. However, on the second appeal the Court of Appeals ignored this important factor without any finding that the possibility of this serious result had been eliminated.

It is submitted that the Commission has illegally modified Section 309(d) of the Communications Act, ignored the clear and specific rulings of this Court, and

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[13] *Radio Carrollton*, 69 F.C.C.2d at 1151, App. 29a.

denied existing licensees the rights guaranteed by the Bill of Rights. The result of this action will seriously limit the Commission's ability to fulfill its statutory mandate of determining whether the public interest will be served by a grant of applications for new broadcast facilities.

II.

THE FEDERAL COMMUNICATIONS COMMISSION IN FAILING TO EMPLOY THE SAME STANDARD OF PROOF, I.E., CLEAR AND CONVINCING EVIDENCE, IN A RENEWAL PROCEEDING INVOLVING DISQUALIFYING CHARACTER ISSUES, AS IT MUST IN A REVOCATION PROCEEDING, ACTED CONTRARY TO THE INTENT OF CONGRESS AND VIOLATED BASIC PRINCIPLES OF DUE PROCESS OF LAW

In its *sua sponte* reconsideration of its decision after the remand, *Radio Carrollton*, 69 F.C.C.2d 424, App. 15a, the Commission announced for the first time that it had employed the preponderance of the evidence standard in finding Faulkner unqualified to be a Commission licensee. The Commission affirmed its use of the preponderance of the evidence standard in its subsequent *Memorandum Opinion and Order, Radio Carrollton,* 72 F.C.C.2d 264, App. 3a. The Commission erroneously concluded that to use the standard of "clear and convincing" evidence urged by Faulkner would "prevent the Commission from carrying out its statutory mandate and would in effect establish a prohibited property interest in a broadcast license." *Id.* at 270-71, App. 9a-10a. This argument was apparently accepted by the United States Court of Appeals for the District of Columbia Circuit, the *same* court which held in *Sea Island Broadcasting Corp. of S.C. v. FCC*, 627 F.2d 240 (D.C. Cir. 1980), *cert. denied*, 49 U.S.L.W. 3246 (1980), that the "clear and convincing" standard of proof must be employed in

license revocation proceedings. Faulkner submits that the reasons given by the lower court for applying the "clear and convincing" standard in revocation proceedings apply with equal, if not greater force, to license renewal proceedings where disqualifying issues of character are raised against the licensee.

One aspect of the issue of whether an administrative agency's findings must be supported by clear and convincing evidence is currently before this court in *Steadman v. Securities and Exchange Commission*, No. 79-1266. While that case concerns SEC disciplinary proceedings involving alleged violations of the anti-fraud provisions of the securities laws, it presents the issue of whether an agency determination which has the effect of permanently excluding an individual or corporation from the business regulated by that agency must be supported by clear and convincing evidence, rather than by a mere preponderance of the evidence. This Court's disposition of *Steadman* will definitely impact on other administrative agency adjudications. Indeed, in oral argument before this Court, the General Counsel for the Securities and Exchange Commission compared the impact of *Steadman* on administrative adjudication to the impact of *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), on administrative rule-making. Moreover, in oral argument in this case before the United States Court of Appeals for the District of Columbia Circuit, counsel for the Federal Communications Commission suggested that the lower court should wait until this Court issued its decision in *Steadman* before rendering a decision on Faulkner's appeal.

While there is no conflict *per se* among the courts of appeals on the specific issue presented in Faulkner's

case,[14] the conflict presented in the *Steadman* case (i.e., the Fifth Circuit's holding in *Steadman v. SEC*, 603 F.2d 1126 (5th Cir. 1979), versus the District of Columbia Circuit's holding in *Collins Securities Corp. v. SEC*, 562 F.2d 820 (D.C. Cir. 1977)) directly affects Faulkner's case, since the Court of Appeals for the District of Columbia specifically followed *Collins* in requiring the Federal Communications Commission to employ the "clear and convincing" test in license revocation proceedings. In *Sea Island*, 627 F.2d at 244, the court held that "revocation of an FCC license is governed, at the agency level, by the 'clear and convincing' standard of proof set forth in the *Collins* decision for an SEC revocation of a broker's license."

The question presented in Faulkner's case which will remain unresolved by *Steadman* is whether the standard of proof employed in an administrative adjudication will be determined by the type of proceeding involved (i.e., a license revocation or suspension proceeding versus a license renewal proceeding) or by the issues and ultimate result to the party or parties whose rights are being adjudicated by an administrative agency. This issue is of critical importance to the broadcasting industry since, as is demonstrated below, the Federal Communications Commission can choose to raise charges involving misrepresentation and/or fraud (which, if proved, could permanently disqualify a broadcast licensee) in either a license renewal or a license revocation proceeding. In *Sea Island, supra,* the District of Columbia Circuit held that misrepresentation in a license revocation proceeding had

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[14] By statute, appeal from an order denying an application for renewal can only be made to the United States Court of Appeals for the District of Columbia Circuit. 47 U.S.C. § 402(b)(2).

to be proved by clear and convincing evidence. However, in *Faulkner*, the Court affirmed decisions of the FCC which found Faulkner guilty of misrepresentation by a mere preponderance of the evidence, with the result that the licensee was held to be *unqualified* to remain a licensee.

In *Sea Island* the court of appeals focused on the severity of the sanction proposed: license revocation and the ultimate loss of livelihood for the licensee. It was this factor which the court found determinative in *Sea Island* but ignored in Faulkner's appeal. However, when a broadcaster is found to lack the requisite character qualifications to be a Commission licensee, the end result (loss of license and loss of livelihood) is the same whether the proceeding involved is a renewal or revocation proceeding. Disqualification is the most serious sanction the FCC can impose on a licensee. It may involve more than the revocation of a single license and more than the failure to renew a single license. When a disqualifying character issue is raised against a broadcast licensee, resolution of the issue affects all the licensee's broadcast holdings and permanently impairs its ability (and the ability of its principals) to be a licensee in the future.[15] Moreover, when that disqualifying issue involves misrepresentation to the Commission, criminal charges may also be brought against the licensee. *See* 18 U.S.C. §1001 (1976).

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[15]In Faulkner's case, the Commission has held that its finding that Faulkner is unqualified to be a Commission licensee will be "*res judicata*" with respect to Faulkner's six other radio stations whose renewal applications are pending. In so doing, the Commission refused to allow Faulkner the normal evidentiary hearing on the six renewal applications. *See Faulkner Radio, Inc.*, 61 F.C.C.2d 23, 25 (1976), App. 55a, 57a.

The Communications Act of 1934, as amended, does provide separately for license renewal and license revocation proceedings. *Compare* 47 U.S.C. §307(a) (1976) *with* 47 U.S.C. §312 (1976). It also provides that the *burden of proof* is on the renewal applicant insofar as the ultimate conclusion of whether a grant will serve the public interest is concerned. *See* 47 U.S.C. §309(e) (1976). However, the Act does not address the question of what *standard of proof* is required before the FCC may make an adverse finding against a licensee on a specific charge involving misrepresentation or fraud in either a revocation or renewal proceeding. What Congress did not foresee or intend was that the Commission would apply a different standard of proof, insofar as specific charges of misrepresentation or fraud were concerned, in each type of proceeding. Since the Act allows the Commission to select the type of proceeding to be used when it considers charges which can result in the permanent disqualification of a licensee, the Commission can control the *standard of proof* to be applied and thus, in effect, control the outcome of a case.

Although a broadcast license period is generally three years, the Commission, by its own regulations, may *direct* a licensee to file its application for renewal prior to its established filing date. *See* 47 C.F.R. §73.3539(c) (1979). Furthermore, when charges are raised against a licensee during a license term, the Commission can decline to proceed by a revocation proceeding and elect, as it did in Faulkner's case, to wait until after the licensee files its renewal application to raise those issues against the licensee. In view of the Commission's ability to select the type of proceeding in which a disqualifying issue against a licensee can be litigated, no artificial distinction between license revocation and license renewal proceed-

ings should be countenanced insofar as the *standard of proof* is concerned.

In *Addington v. Texas*, 441 U.S. 418, 423 (1979), this Court noted:

> "The function of a standard of proof, as that concept is *embodied in the Due Process Clause* and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.' [Citation omitted.] The standard *serves to allocate* the *risk of error* between the litigants and to *indicate the relative importance attached to the ultimate decision.*" (Emphasis added.)

The Court also described the three standards or levels of proof for different types of cases, noting:

> "At one end of the spectrum is the typical civil case involving a monetary dispute between private parties. *Since society has a minimal concern* with the outcome of such private suits, plaintiff's burden of proof is *a mere preponderance of the evidence.* The litigants thus share the risk of error in roughly equal fashion.
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> "The intermediate standard, which usually employs some combination of the words 'clear,' 'cogent,' 'unequivocal,' and 'convincing' is less commonly used. . . . One typical use of the standard is in *civil cases involving allegations of fraud* or some other quasi-criminal wrongdoing by the defendant. The interests at stake in those cases are deemed to be *more substantial than mere loss of money* and some jurisdictions accordingly reduce the risk to the defendant of *having his reputation tarnished* erroneously by increasing the plaintiff's burden of proof." *Id.* at 423-24 (emphasis added).

In determining which standard to employ in *Addington*, a civil commitment proceeding, this Court weighed the interests at stake for the individual and the state, concluding that "[t]he individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state." *Id.* at 427.

A similar weighing of the interests must be undertaken here. As noted above, for the broadcast licensee there can be no more serious finding by the Commission than that the licensee is unqualified to remain a licensee because it lacks the requisite character qualifications. Moreover, since character issues generally involve a question of fraud or misrepresentation, there is an obvious risk of permanent damage to the licensee's reputation. In contrast, the FCC has an interest in allocating a scarce resource to those qualified to hold a broadcast license, and the Commission must have absolute trust and confidence in the representations made to it by its licensees. In balancing these interests, it must be emphasized that the risks to the individual are presented in the context of an administrative adjudication where the Commission performs the functions of investigator, prosecutor, and ultimate factfinder. Clearly, the possible injury to the individual broadcast licensee, i.e., loss of livelihood and irreparable injury to the licensee's reputation, is significantly greater than any harm to the public if, because it is required to employ a clear and convincing standard of proof in making findings of fraud or misrepresentation, an administrative agency may license a person lacking in some degree the very high standard of public stewardship expected of broadcast licensees.

In Faulkner's case the standard of proof selected was critical. The principal issues raised against Faulkner in-

volved its purpose or intent in filing a pleading with the Federal Communications Commission and whether misrepresentations had been made about that purpose or intent. The findings against Faulkner are related to the expressed or implied intent and motivation of Faulkner and its former Vice President and minority stockholder. The findings on character issues involving motive and misrepresentation, based upon a preponderance of the evidence standard, may well cause Faulkner Radio, Inc. to lose all seven of its radio station licenses. It is submitted that, if findings had been based upon a "clear and convincing evidence" standard, the renewal application of Station WLBB would have been granted. Such a result makes a mockery of the cherished principle that the American government is one of laws and not of men and would never have been permitted by Congress if it could have foreseen that this inequitable procedure would be established by administrative fiat.[16]

Clearly, this is an important matter of administrative law affecting a substantial number of American citizens which must be resolved by the judiciary in the absence of specific statutory authority. *See, e.g., Woodby v. INS,* 385 U.S. 276, 284 (1966); *Collins Securities Corp., supra,* 562 F.2d at 823.

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[16]*See* S. Rep. No. 96-1055, 96th Cong., 2d Sess. 11-13 (1980).

CONCLUSION

For the foregoing reasons, the requested petition for a writ of certiorari should be granted.

Respectfully submitted,

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